

a

SHAMSUDDIN HASSAN & ANOR.

v.

PUBLIC PROSECUTOR

b

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOF MOHAMED SCJ
[CRIMINAL APPEAL NO. 05-25-91]
11 SEPTEMBER 1991

c

CRIMINAL PROCEDURE: *Dangerous drugs trafficking - Presumptions of control and custody - Knowledge - Drugs thrown from car - Drugs handed over to investigating officer only 5 hours after arrest - Drugs handed to chemist only 5 days later - Common intention - No evidence as to who threw the bundle out of car - Serious gaps in the chain of evidence - Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), 39B(2) - Penal Code, s. 34.*

d

The appellants were both convicted and sentenced to death by the High Court in relation to an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). This was their appeal against sentence and conviction.

e

The facts were that as the police were pursuing the car in which the appellants were travelling, a bundle was thrown out of the car. The police could not identify the person who threw the bundle out of the car. The bundle was found to contain cannabis. The bundle however was only handed over to the investigating officer 5 hours after the discovery and was only sent to the chemist 5 days after the arrest.

The prosecution relied on the presumption of knowledge under s. 37(d) of the Act on the basis that the drugs were seen being thrown out of the car.

Held:*f*

[1] As there was no explanation as to what the police officer did with the drugs for more than 5 hours before he handed it over to the investigating officer, there were serious gaps in the chain of evidence with regard to the drugs being thrown out of the car and the exhibits produced in Court. On this ground alone the appellants should not have been called upon to enter into their defence.

g

[2] The prosecution had failed to prove that the reason why the appellant drove his car fast was because he was aware of the existence of the drugs and that he was being pursued by the police. This was because the police were pursuing him in unmarked cars.

h

[3] The mere fact of a bundle being thrown out of the car is not evidence of common intention or evidence from which such common intention can properly be inferred. There was no evidence of who actually threw out the bundle. There is also no evidence that the pillow case stuffed with drugs were shown to the appellants after their arrest or that they were confronted with this evidence.

i

[4] The fact that the drugs were thrown out of the car was insufficient to establish custody or control. It would however have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car. There was accordingly no evidence of custody or control of the drugs to raise the presumption under s. 37(d) of the Act. Until this can be proved, the presumption under s. 37(da) of the Act that the appellants were trafficking in dangerous drugs does not arise.

[Appeals allowed; both appellants acquitted and discharged.]

[Bahasa Malaysia translation]

PROSEDUR JENAYAH : Mengedar dadah berbahaya - Anggapan kawalan dan jagaan - Pengetahuan - Dadah dibuang daripada kereta - Dadah diberikan kepada pegawai penyiasat hanya 5 jam selepas penangkapan - Dadah diberikan kepada ahli kimia hanya 5 hari kemudian - Niat sama - Tiada keterangan mengenai siapa yang membuang bungkusan daripada kereta - Perbezaan nyata dalam rangkaian keterangan - Akta Dadah Berbahaya, ss. 37(d), (da), 39B(1)(a), 39B(2) - Kanun Keseksaan, s. 34.

Pihak perayu telah disabit dan dihukum mati oleh Mahkamah Tinggi berhubung dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta tersebut). Ini adalah rayuan mereka terhadap hukuman dan sabitan.

Semasa polis mengejar kereta yang dinaiki oleh perayu, suatu bungkusan dibuang daripada kereta. Pihak polis tidak dapat memastikan siapa yang membuang bungkusan tersebut daripada kereta. Bungkusan itu didapati mengandungi candu. Bungkusan itu hanya diberikan kepada pegawai penyiasat 5 jam selepas dijumpai dan hanya dihantar kepada ahli kimia 5 hari selepas penangkapan.

Pihak pendakwa bergantung kepada anggapan pengetahuan di bawah s. 37(d) Akta tersebut kerana dadah itu dilihat dibuang dari kereta itu.

Diputuskan:

[1] Oleh kerana tiada penjelasan mengenai apa yang telah dilakukan oleh pegawai polis dengan dadah itu untuk jangkamasa lebih dari 5 jam sebelum ia diberikan kepada pegawai penyiasat, terdapat perbezaan yang nyata dalam rangkaian keterangan mengenai dadah yang dibuang daripada kereta dan barang kes yang dikemukakan di Mahkamah. Berdasarkan fakta ini sahaja pembelaan perayu tidak patut dipanggil.

[2] Pihak pendakwa telah gagal membuktikan bahawa sebab perayu memandu keretanya dengan laju ialah kerana dia tahu akan kewujudan dadah itu dan bahawa dia dikejar oleh polis. Ini adalah kerana pihak polis menjejarnya dalam kereta yang tidak bertanda.

[3] Fakta mengenai pembuangan sebuah bungkusan dari kereta tidak membuktikan niat sama dan tidak merupakan bukti bahawa niat sama boleh disimpulkan. Tiada bukti yang menunjukkan siapa yang membuang bungkusan itu. Tidak ada bukti bahawa bantal yang berisi dadah telah ditunjukkan kepada perayu selepas penangkapan mereka ataupun sama ada mereka dihadapkan dengan bukti ini.

[4] Fakta pembuangan dadah daripada kereta tidak memadai untuk membentuk jagaan atau kawalan. Walaubagaimanapun keadaan mungkin berbeza jika cuma seorang perayu berada di dalam kereta pada masa tersebut, atau jika seorang daripada mereka jelas kelihatan membuang bungkusan itu dari kereta. Sedemikianlah, tidak ada bukti mengenai jagaan atau kawalan dadah itu untuk membangkitkan anggapan di bawah s. 37(d) Akta tersebut. Sehingga ini dapat dibuktikan, anggapan di bawah s. 37(da) Akta tersebut bahawa perayu sedang mengedar dadah berbahaya tidak timbul.

[Rayuan dibenarkan; kedua perayu dibebaskan dan dilepaskan.]

Cases referred to:

R. v. Abbott [1955] 2 All ER 899 CCA (cons)

Lee Yoon Choy & Ors. v. PP [1948-49] MLJ Supp 167 (cit)

Mahbub Shah v. Emperor (32) [1945] AIR PC 118 (cit)

a Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), (2)
Penal Code, s. 34

For the appellants - Gurubachan Singh (Kartar Singh with him); M/s. Bachan & Kartar

For the respondent - Stanley Isaacs, DPP

b**JUDGMENT****Harun Hashim SCJ:**

The appellants were jointly charged with trafficking in 1,614.1 grammes of cannabis on 7 March 1986, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same Act read with s. 34 of the Penal Code. They were both convicted and sentenced to death by the High Court at Ipoh on 2 March 1991.

c

The case for the prosecution was that the police received information that a Ford Capri motor car with registration number AR 497 was carrying drugs from Taiping to Lumut. Acting on the information, the OCPD organised an ambush with four police unmarked cars and waited at the junction of Taiping - Changkat Jering roads. At about noon, a Ford Capri AR 497 was seen coming out of a petrol station and proceeded towards Trong/Bruas. Three police cars followed the Ford car. After travelling about 1½ miles, PW4, a policeman in the first car, saw a bundle being thrown out of the left window of the Ford car. He stopped his car and picked up the bundle which was a batek cloth pillow case stuffed with cannabis. The OCPD, who was driving the second car, continued to follow the Ford car and some 3½ miles away found it had come to a stop after meeting with an accident. In the car he found the appellants with a 15 month-old child in the arms of the second appellant. He placed them under arrest. Whilst there, PW4 who had collected the drugs from the roadside arrived and showed it to the OCPD. He was directed to keep the drugs and hand it over to the investigating officer.

e

All the police officers except PW4 returned to the Kuala Kangsar Police Station with the appellants arriving there at about 1 p.m.

f

PW4 said he went alone to Changkat Jering Police Station with the drugs and waited there for further orders. He eventually returned to Kuala Kangsar Police Station arriving there at about 5.00 p.m. He waited for the investigating officer and handed over the drugs to him at about 6.00 p.m. that day. The investigating officer handed over the drugs to the chemist for examination on 12 March 1986. The drugs that were handed over to the chemist were not marked until it was packed 6 days after the investigating officer had received it from PW4. There was no explanation what PW4 did with the drugs for more than 5 hours before he handed it over to the investigating officer. We are of the view that these are serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in Court. On this ground alone, the appellants should not have been called upon to enter in their defence.

g**h**

Next, there was no evidence of common intention as intended by s. 34 of the Penal Code. All that the prosecution was able to show was that the appellants are husband and wife; that in their house were two pillows, one with a pillow case identical with that in which the drugs were found and another identical pillow was without a pillow case; and that drugs were thrown out of the car when they were both in the car. There was no evidence as to who actually threw out the bundle but it was sought to be inferred it must be the wife appellant as the bundle was thrown out of the left side of the car, the car having only two doors and the wife appellant sitting next to the husband appellant who was driving the car.

i

Even assuming that there is no break in the chain of evidence regarding the drugs from the time of its initial recovery by the police from the roadside until its production in Court at the trial, at best the evidence showed that one of the appellants must have had custody or control of the drugs to throw it out of the car. But who?

The prosecution also attempted to show that the first appellant must have known of the existence of the drugs in his car because he drove the car very fast on realising that he was being pursued by three police cars. The police may have been chasing the appellant's car but it does not follow that the appellant knew he was being followed by the police. It will be recalled that all the police cars were unmarked cars. There was no siren or other indication that they were police cars. It seems obvious to us that what the police intended was to follow the appellant's car with the objective of finding out where the drugs were being delivered to. If that was not the intention of the police, they could have very easily stopped the appellant when he was at the petrol station or as he was coming out of it.

In *R. v. Abbott* [1955] 2 All ER 899 CCA, Lord Goddard CJ cites a case at p. 901:

in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

In the instant case, the learned Judge has not dealt at all with s. 34 of the Penal Code in respect of common intention. Indeed s. 34 of the Penal Code was not inserted in the charge until the day the trial commenced. Be that as it may, it is essential that there should be evidence of a common intention, or evidence from which such common intention can properly be inferred, to commit the act actually committed, see *Lee Yoon Choy & Ors. v. PP* [1948-49] MLJ Supp 167 CA quoting with approval *Mahbub Shah v. Emperor* AIR (32) 1945 Privy Council 118. The mere fact of a bundle being thrown out of the car is not evidence of common intention or evidence from which such common intention can properly be inferred.

The learned Judge has not made any finding as to who threw out the bundle from the car. There is no evidence that the pillow case stuffed with drugs were shown to the appellants after their arrest or that they were confronted with this evidence. It was contended that the presumption of knowledge under s. 37(d) of the Act arose from the fact that the drugs were thrown out of the car. In our view, this fact alone is insufficient in this instance to establish control or custody. It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.

There was accordingly, no evidence of custody or control of the drugs to raise the presumption under s. 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Until this can be proved, the presumption under s. 37(da) of the Act that the appellants were trafficking in dangerous drugs does not arise.

For the reasons stated, we allowed the appeal of both the appellants, quashed their convictions and set aside the death sentences. The appellants were accordingly acquitted and discharged.

Also found at [1991] 3 CLJ 2414